

+

This study is an attempt to examine two questions concerning the cryptologic profession and the activities ~~activities~~ ~~of~~ of the United States. First, exactly what is the legal status of cryptology and secondly, under what authority established the National Security Agency and under what authority does it function?

There are a number of difficulties associated with an examination of cryptology and one of the first encountered is the problem of the definition of terms. For the purposes of this study the term cryptology includes has two branches; cryptography, a body which we will mean the ~~computation~~ production and safeguarding of United States codes and ciphers, and cryptanalysis, or the obtaining; analysis of all communications for the purpose of discerning intelligence. We apologize to the technicians who will understandably quibble with these definitions and argue about signals analysis, short, and telecommunications. But since we are defining the terms which will suffice for the purpose of this study, these are the parameters under which we will operate. If a question arises and it doesn't fall in the area of cryptography, it is cryptanalysis.

The question of the legality of clandestine cryptologic activities has plagued the profession from its inception. It is an extremely interesting fact we do note that until very recent times the only ones to raise the question were the professionals in the business even under the scrutiny of the Church Committee the long question

~~it is not a question of the existence of the National
Security Agency which is at the heart of the matter,
but the fact that it was not founded
on public law~~

The first hint of this problem came to light in an interview conducted with Wally A. "Ham" Wright, a Navy cryptanalyst used before World War II, and one of Joseph J. Rochefort's able assistants at Pearl Harbor at the time of the attacks of Pearl Harbor and Midway, and who later served with AFSA and NSA. It will be remembered in service that back in the 1930's there was a great deal of confusion and uncertainty about the legality of what they were doing and that they never did know if it was legal or not. This was puzzling to us at the time but subsequently we have had to follow this through and try to discover just what and how as we began to delve more deeply into the history of the business certain facts came to light which were discovered and which led to this rather detailed examination of the problem. It is interesting to note that the questions raised about the legality of the business have been by the professionals within the business rather than by outsiders. It seems rather strange ~~this~~ ~~the~~ ~~the~~

~~General Allen's~~

General Allen's recent appearance
before the Senate Committee has prompted two
questions which

This study is an attempt to examine two questions concerning the cryptologic profession and its activities. The first is related to question of the one which is prompted by Senator Church's remarks directed to General Allen in which he stated that the sole authority for the establishment of the National Security Agency rests with Presidential Decisions. Just what was the authority which established the NSA and under what authority does it function? The second question is much broader and deals with one which, oddly enough, has not been asked except by the has been played the profession since its inception and yet is only asked by a few professionals in the business, 'exactly what is the legal status of the classified federal cryptologic profession itself?' In discussing this latter question, for purposes of clarity and with profuse apologies to Mr. William F. Friedman, we will lump everything into one of two categories, either cryptanalysis or cryptography. For even greater clarity, cryptography will be defined as the production and ~~receipt~~^{receipt} of U.S. Government communications and ~~that~~ cryptanalysis is everything else. We include everything that is not cryptography.

¹ aside from all the other problems with these definitions there is the question of what about intercepting our own

There has never been a problem or question about the legality of cryptographic activities in the U.S. government during 1870 as a purely arbitrary beginning date, there or ample evidence that such activities were conducted under duly constituted authorizations. The act of October 1, 1890 (10 Stat 650) states in part that, "The Chief Signal Officer shall have charge, under the direction of the Secretary of War, of all military signal duties and of works, papers and devices connected therewith." ^{which} codes and papers were maintained in the Army Regulations of 1901 paragraph 1741 charges the Chief Signal Officer with "the preparation, distribution and revision of the War Department Telegraph Code." This same provision is contained in the regulations until a slight change was made in 1905. In that year, the Adjutant General ^{was given} had the responsibility of distributing the War Department Telegraph Code. In 1922 another change occurred as the Chief Signal Officer was responsible for "the preparation and revision of the War Department Telegraph Code and such other codes and papers required by the Army." The responsibility remained unchanged until 1929.

2. 1904 Army Regulations paragraph 1586, 1908 Regulations paragraph 1574, 1910 Regulations paragraph 157F, and 1913 Regulations paragraph 1556.

3. Army Regulation 105-5 January 14, 1922, paragraph 2C
Also the same provision was contained in changes No. 1 of October 20, 1923 and Army Regulation 105-5 of December 15, 1926 paragraph 2C.

Thus there is obviously little doubt about the duly sanctioned authority of the chief signal officer for engaging in cryptographic activities up to 1929.

For the moment, we'll leave the cryptographic side of the coin and examine what had been happening in cryptanalysis. This is the more critical area, if at least from the standpoint of legal sensitivity.

The first real violation that officials in the government were engaged in activities other than cryptographic came during the Spanish American War. The Report of the Chief Signal Officer to the Secretary of War for the fiscal year ending June 30, 1898, it stated that "... the chief

signal officer appreciated fully the advantages to be derived from careful examination

of the thousands of messages of unfriendly or neutral character that passed through

the hands of his subordinates from

newspaper correspondents, blockade runners,

Scout agents, commercial messages, personal

dispatches, etc., there was reaped a rich

harvest of information."

It is certainly apparent from this statement that the U.S. was obtaining intelligence although one can only speculate as to how it was obtained. The Army certainly did not have intercept stations at this early date. That our own material was captured and analyzed. It is probably realistic to assume

It is certainly apparent that from the
statement that government officials

that the materials were captured, suspicious letters opened, commercial cables were made available to government officials, and that "personals" in newspapers were scrutinized and some found to be encoded. The point is, that there was no legislation, at least none which can be found, which prohibited any of these activities and certainly not during a wartime situation.

The first legal problem ~~arose~~ ^{arose} in 1912 when ^{the 62nd} Congress enacted Public Law No. 264 [S. 6412] entitled an act to regulate Radio Communication.

Under Section 12 on the Secrecy of Messages the law prohibited anyone from publishing or divulging the contents of any messages sent or received by a radio station. This certainly was not directed toward radio intercept because there simply wasn't any at this time. What it apparently intended to do was to prohibit any unauthorized recipient from having access to the contents of messages sent by it and received by the commercial companies or government stations.

This provision was contained in all of the subsequent legislation right on up to and including the Communications Act of 1934.